



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: D. KLUG, *et al.*

Confirmation No.: 1401

Application No.: 09/837,234

Group Art Unit: 1761

Filing Date: April 18, 2001

Examiner: Lien Tran

For: SUGAR WAFER WITH CONFECTIONERY
FILLING AND METHOD FOR MAKING
SAME

Attorney Docket No.: 88265-4026

DECLARATION OF PATRICK COUZENS UNDER 37 C.F.R. § 1.132

Box Non-Fee Amendment

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Sir:

I, Patrick John Couzens, do declare that:

1. I am a British subject and currently reside at 4 Landau Close, York,
YO30 5FT, UK.

2. I joined Nestec York Ltd. in 1991 and from 1991 to 1995 I worked as a scientist in the Applied Sciences Department working on a number of projects that involved the application of scientific understanding to confectionery product and process development. Part of this work involved the measurement of glass transitions and crystallisation in sugar and baked confectionery. In 1995 I spent 6 months on assignment to the Nestlé Research Centre in Lausanne, Switzerland, studying lipid migration in chocolate confectionery. On my return to York I was promoted to Senior Scientist studying lipid migration and managing product development projects for filled chocolate products where lipid migration was an issue. In 1996 I joined the Chocolate and Biscuit Department of Nestec York where I managed confectionery development projects with particular responsibility for coated and panned confectionery including the Nestlé product "Smarties". I also carried out studies of confectionery products manufactured by Nestlé's competitors. I was awarded a doctorate (DPhil) from the University of York in 1991 for research in physical chemistry. I am a

Member of the Royal Society of Chemistry and I have Chartered Chemist (CChem) status and also the designation of European Chemist (EurChem).

3. In March 2002 I moved to my current position which is Intellectual Asset Manager in the Nestlé Product Technology Centre at York. In this role I still retain involvement in the research and development relating to chocolate and confectionery products being carried out at the Centre but from the perspective of ensuring that any intellectual property arising from the work is protected and as part of this role I provide a liaison between the scientists in the Centre and the Nestlé Patent Department in Switzerland.

4. I have reviewed and understand the above-identified patent application, the pending claims, the Office Action, and the reference cited by the Examiner in the above-identified application. Specifically, this reference is WO 00/13512 ("Conti"). I am making the following statements as one of ordinary skill in the art in support of the patentability of the claims in this application.

5. The above-identified application is directed to a food product that includes a sugar wafer cone having a filling including a mass of a substantially water-free based confectionery material that includes a blend of chocolate and non-lauric vegetable fat that has solidified in the sugar wafer from a molten mass prior to consumption. Beneficially, the cone acts as a handle to keep a user's hands clean during eating of the product, and the product combines the pleasure and fun of eating an ice cream cone with the indulgence of a fat-based confection. Methods of forming these sugar wafer cones with a mass of a substantially water-free based confectionery material are also included.

6. The Office Action rejects the language of claims 11 and 22-23 primarily for the language "portion of the mass flows to conform to the shape of the sugar wafer" and "filling in a second desired shape that corresponds to the desired shape of the sugar wafer and which is sufficiently solid to retain the second desired shape." The term "molten" appears in the specification in connection to confectionery masses that can also be in semi-solid or semi-liquid state, and as one of ordinary skill in the art I understand this term to encompass a flowable confectionery mass that would conform to the object into which it is placed. A portion of the molten confectionery material(s) described in this application will always flow at some rate over time to conform to the shaped sugar wafer into which it is

placed. With respect to the "filling in a second desired shape," it is understood from the specification that the filling can be provided in a desired shape that is retained once the filling hardens. Claim 22 was also rejected for the language under ambient temperature. It is clear to me that ambient conditions are used when nothing else is specified. The lack of a specific temperature means the default is to be used--and that is always ambient temperature in this art. Thus, "ambient temperatures" is inherent in the teachings of this application since nothing contradicts or suggests colder or warmer temperatures required.

7. Conti teaches an improved sugar wafer batter composition to increase the sugar wafer processability by providing sufficient flexibility over a longer period of time in a freshly baked wafer as it cools under ambient conditions (Conti, page 2, lines 3-9 and page 4, line 21). In this regard, Conti teaches generically that various conventional confectionery materials can be used with the wafers, including ice creams or chocolates or other fatty materials such as fat-based cream or fat-based creams containing yogurt, or other savory fillings (Conti, page 4, lines 16-20). Conti also teaches a variety of shapes and sizes for the wafers, including flat sheets, cup or cone-shaped, tubes, or the like (Conti, page 4, lines 12-13).

8. Because Conti is directed to sugar wafer batter compositions and improved sugar wafer flexibility, it does not have any specific teachings as to the type of confectionery materials other than those noted above. Thus, Conti does not teach that a confectionery mass could be used or would have any benefits compared to, *e.g.*, a solid chunk, pieces, or a liquid filling. Conti also does not teach that any particular fillings are better or worse than others for the purpose of providing a substantially water-free confectionery mass, as presently recited. Further, Conti does not disclose the combination of chocolate and non-lauric vegetable fat, or the benefits thereof in forming a confectionery mass as presently recited. In fact, Conti teaches that moisture barriers can be used to separate fillings and the sugar wafer (Conti, page 4, lines 28-33), but Conti does not teach the benefits of using specific fillings like the present application that avoid the need for a moisture barrier. Instead, Conti teaches using low water activity materials, *i.e.*, those that bind water therein to prevent migration (Conti, page 5, lines 1-3) rather than those that are substantially water-free as recited in the present invention.

9. Conti also does not teach the specific benefits of providing specific substantially water-free materials that have hardened as a mass in a sugar wafer, which is shaped like a cone, to provide the benefits of ice cream products without the messy drawbacks of an ice cream product. Again, this is because the invention in Conti is directed to improving the sugar wafer materials itself, and not to providing any specific type of final food product or a process for making a specific type of final food product. Also, Conti does not address the possibility of shaping the filing, such as into a dome shape to provide an ice-cream like appearance to the food product.

10. Conti does not provide motivation to combine the specific substantially water-free confectionery materials including chocolate and non-lauric vegetable fat, particularly in the form of a mass, into the specific cone shape recited to provide the benefits recited. Even though Conti generally teaches various materials, along with chocolate in specific, it does not motivate combining non-lauric vegetable fat with chocolate to attain the benefits claimed in the present application. There was no motivation from Conti to choose specific filling materials that harden or solidify in the sugar wafer cone to facilitate processing and provide the benefits of ice cream using indulgent substantially water-free confectionery materials, as now claimed.

11. In addition to the various differences in the claimed invention from Conti, Conti clearly does not motivate one of ordinary skill in the art to perform the methods recited in the application. The Office Action even correctly states that Conti does not teach hardening a filling material. Conti also does not teach introducing a substantially water-free fat-based confectionery in a molten mass into a sugar wafer, as recited in this application. Conti also does not specifically teach or motivate the use of certain filling materials that also are provided by flowing into the wafer and then harden or solidify therein, as presently recited.

12. It is thus my opinion and judgment, as one of ordinary skill in the art, that the claim language is supported by the specification of this application, and that the claimed invention is not obvious in view of Conti. There was no motivation to pick and choose specific materials and features from the generic disclosures of Conti to arrive at the presently claimed invention. Even if various specifics were pulled out of Conti, the combination of these specific features would not have motivated one of ordinary skill in the

art at the time of the invention to modify the disclosures of Conti to arrive at the different product and process of the claimed invention.

13. I further declare that all statements made herein of my knowledge are true and all statements made on information and belief are believed to be true; and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of this application or any patent issuing thereon.

Dated: 24th July 2003



Patrick John COUZENS